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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/797,282	03/10/2004	David Kirchhoff	03968-P0001D	2941

24126 7590 03/13/2006

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EXAMINER

ASTORINO, MICHAEL C

ART UNIT PAPER NUMBER

3736

DATE MAILED: 03/13/2006

Please find below and/or attached an Office communication concerning this application or proceeding.

Office Action Summary	Application No. 10/797,282	Applicant(s) KIRCHHOFF ET AL.	
	Examiner Michael C. Astorino	Art Unit 3736	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 23 December 2005.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-8, 11-14, 16-35, 38-44 and 47-75 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-8, 11-14, 16-35, 38-44 and 47-75 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413)
Paper No(s)/Mail Date. _____ |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 5) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 3) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449 or PTO/SB/08)
Paper No(s)/Mail Date _____ | 6) <input type="checkbox"/> Other: _____ |

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DETAILED ACTION

The examiner acknowledges the amendment and remarks filed December 23, 2005.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 1-8, 11-12, 14, 17-18, 20-35, 38-39, 41-60, and 62-74 are rejected under 35 U.S.C. 102(e) as being anticipated by Mault et al. US Patent Number 6,513,532 B2 which incorporates by reference Mault 6,478,736 B1, see column 19, lines 1-36, unless otherwise stated the italicized portions cited below are directed to the Mault '736.

See previous office actions for details of the rejection.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 16 and 19 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault et al. US Patent Number 6,513,532 B2 which incorporates by reference 6,478,736 B1, see

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column 19, lines 1-36, *unless otherwise stated the italicized portions cited below are directed to the Mault '736*, as applied to claim 14 above, and further in view of Kolawa et al. US Patent Number 6,370,513 B1.

See previous office actions for details of the rejection.

Claims 13, 40, 61 and 75 are rejected under 35 U.S.C. 103(a) as being unpatentable over Mault et al. US Patent Number 6,513,532 B2 which incorporates by reference 6,478,736 B1, see column 19, lines 1-36, *unless otherwise stated the italicized portions cited below are directed to the Mault '736*, as applied to claim 14 above, and further in view of Abrams et al. US Patent Number 5,673,691 A.

See previous office actions for details of the rejection.

Response to Arguments

Applicant's arguments filed June 6, 2005 have been fully considered but they are not persuasive.

The applicant states that he disagrees with the examiner assertion that the '736 Patent teaches the steps of "computing a difference value between the net total value and the daily food consumption goal" and "crediting the participant with the difference value for utilization of adjusting the daily food consumption goal of a future day". The applicant states, "Nothing in FIG 8B of the 1736 Patent teaches or suggests that the daily food consumption goal is taken into account in the computing of the difference." The examiner disagrees. First of all the '736 Patent teaches the nutritional target of 1549 calories in figure 8B and 8C. The calorie amount is interpreted by the examiner as the daily food consumption goal. The net total value is illustrated

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in figure 8C as the balance level –1552 calories. Additionally, as previously stated by the examiner, the crediting method step is shown in the adjustment of the rate per lbs per week the needs to be lost to meet the subject's ultimate goal. In regards to claim interpretation the word "*for*" the claimed limitation, "crediting the participant with the difference value *for* utilization of adjusting the daily food consumption goal of a future day." The word "for" in the claim may be properly interpreted as "capable of," and "capable of" does not require that reference actually teach the intended use of the element, but merely that the reference does not make it so it is incapable of performing the intended use. As such it is the examiner's position that Mault meets the claimed limitation of "crediting the participant with the difference value *for* utilization of adjusting the daily food consumption goal of a future day" since the subject is credited by reducing the lbs/week rate.

In regards to the applicant's assertion that the loss rate is based on the balance and not the "balance surplus," balance surplus is not recited in the claims.

In regards to amended claims 14 and 49, the limitation preceding the addition is recited in the alternative by using the term "or." Mault clearly uses a non-structured meal plan and meets one of the alternative limitations of structured or non-structured plans. Also, the applicant states, "timed based list of meals which can either be automatically based on at least one component of the initial personal profile or based upon food selections received from the participant." The meal plans being timed based or not is not claimed by the applicant.

In regards to claim 62, the applicant states, "Mault does not disclose, teach or suggest how these nutritional targets are associated with a meal plan to correspond to a meal plan type" and "however, Mault does not teach the possibility to select the meals based on these percentages." These limitations are not claimed by the applicant.

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Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to Michael C. Astorino whose telephone number is 571-272-4723. The examiner can normally be reached on Monday-Friday, 8:30AM to 3:30PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Max Hindenburg can be reached on 571-272-4726. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A handwritten signature in black ink, appearing to read 'MA', with a long horizontal flourish extending to the right.

Michael Astorino
March 5, 2006